

(3)
No. 90-610

Supreme Court, U.S.

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JOSEPH T. SPANIEL, JR.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

EDWARD WALTHER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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Petitioner was previously sentenced to a six-year prison term without possibility of parole. The court of appeals remanded the case to the district court to permit the district court to decide whether to impose a parolable or a nonparolable sentence. In his petition for a writ of certiorari, petitioner contended that the district court lacked authority to sentence him to a no-parole term. In our opposition to the petition, we noted that this case is in an interlocutory posture and that the question presented would become moot if, on remand, the district court did not sentence petitioner to a no-parole term. We have been advised that the district court recently resentenced petitioner, and in so doing deleted the words "without parole" from its prior sentencing order. Accordingly, petitioner's complaint about his sentence has been resolved in his favor, and there is no need for further review by this Court.

A copy of the new sentencing order is appended to this brief.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DECEMBER 1990

APPENDIX

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

Case No. 87-11 CR-T-10(C)

UNITED STATES OF AMERICA

vs.

EDWARD ALOIS WALTHER, ET AL.

ORDER

The four Defendants in this case were adjudged guilty, based upon a jury verdict returned on May 27, 1987, of two drug related offenses: (1) knowingly and intentionally attempting to possess with intent to distribute approximately 2,900 pounds of marijuana in violation of 21 U.S.C. § 846; and (2) conspiracy with intent to distribute approximately 2,900 pounds of marijuana in violation of 21 U.S.C. § 846. The Court sentenced three of the Defendants to two concurrent ten year terms of imprisonment to be followed by a minimum supervised release period of five years. Defendant Weger was sentenced to two concurrent twelve year terms of imprisonment to be followed by a minimum supervised release period of five years.

The sentences imposed reflected the Court's belief that it was required by 21 U.S.C. § 841(a)(1) to impose at least a minimum mandatory sentence of ten years commitment followed by five years of supervised release. The subse-

quent decision in *United States v. Rush*, 874 F.2d 1513 (11th Cir. 1989) instructed that this belief was incorrect. Therefore, on motions pursuant to Rule 35(a), F.R.Crim.P., by Defendants Woodruff, Walther and Walkenstein, the Court vacated the sentences of those Defendants and, after conducting new sentencing hearings, imposed new sentences upon them. Defendants Walther and Woodruff were sentenced to two concurrent sentences of six years imprisonment without parole. Defendant Walkenstein was sentenced to two concurrent sentences of four years imprisonment without parole.

Defendant Walther appealed his new sentence, asserting that the Court erroneously based the sentence on its belief that the statute required that his sentence be imposed "without parole." The United States Court of Appeals for the Eleventh Circuit, by mandate issued August 15, 1990 (No. 89-3949), agreed, and held that the Court could have imposed non-parolable terms of imprisonment but was not required by the statute to do so. The Circuit Court therefore vacated Defendant Walther's sentence and remanded for resentencing.

Before the Court are motions by Defendant Walther to waive his presence at resentencing proceedings and to expedite a resentencing hearing. Defendant Weger has also filed a motion, pursuant to Rule 35(a)¹ to correct an illegal sentence. The government has not responded to any of the motions.

Rule 43(c)(4), F.R.Crim.P., provides that a defendant need not be present at hearing for the reduction of sentence pursuant to Rule 35. For the purposes of this rule, a resentencing hearing to determine whether a de-

¹ Former Rule 35(a), F.R.Crim.P., as it existed prior to its amendment effective November 1, 1987, applies to this case. See *United States v. Walther*, No. 89-3949 slip op. at 1, n.1 (11th Cir. 1990).

fendant should be made eligible for parole is a reduction of sentence hearing. *See Oeth v. United States*, 390 F.2d 609 (5th Cir. 1968). Defendant Walther has filed an affidavit stating that he knowingly and voluntarily waives his right to appear personally at a resentencing hearing.

Accordingly, upon due consideration, Defendant Walther's motions to waive his presence at resentencing and to expedite a hearing are GRANTED, and the amended judgment entered on March 5, 1990 (Doc. #236) is amended by deleting the words "without parole." The Clerk is directed to furnish a copy of this Order to counsel of record, to the Defendant, to the Marshal, to the Probation Officer, and to the Bureau of Prisons.

As his codefendants have successfully argued, Defendant Weger asserts that in light of the decision in *Rush*, the Court's interpretation of 21 U.S.C. § 841(a)(1) was incorrect and that his sentence must be vacated and a new sentence imposed. The Court agrees. Because the Court believed that the mandatory minimum sentencing provisions applied, resentencing is necessary.

Therefore, upon due consideration, Defendant Weger's motion pursuant to Rule 35(a) is GRANTED. The Clerk is directed to schedule a new sentencing hearing by separate notice. Government counsel will be responsible for securing any writ necessary for the production of the Defendant at the hearing.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 20th day of November, 1990.

/s/ WM. TERRELL HODGES

United States District Judge